> the mind of a reasonable person, the reaction of those facts and circumstances upon the mind of such reasonable person, and the reasonable acting on the facts within the mind of the prosecutor, so as to cause a belief the person was guilty of the crime for which the prosecution was being pursued.

Id.

On Mrs. Titelman's motions for directed verdict at her criminal trial before Judge Flournoy, she argued the indictment was deficient, there was reasonable doubt as a matter of law, and an acquittal was required. [Vol. 2-Doc. 33-pg 6, 10] Judge Flournoy disagreed and denied the motions for directed verdict.[1] Judge Flournoy found the evidence authorized a jury to determine guilt beyond a reasonable doubt. The justification for allowing the trial judge to make that determination is straightforward: The quantum of evidence – beyond a reasonable doubt – is substantially greater than mere probable cause. *Monroe, supra*, 256 Ga. App. 761. Judge Flournoy's holdings, as a matter of law, established probable cause, thereby negating the essential element of the malicious prosecution claim brought against Respondents. Attorney Ducote was fully aware of these inescapable points of fact and law.

Attorney Ducote was then required to allege how Judge Flournoy's Orders (denial of motion for directed verdict)

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[1] Attorney Ducote erroneously implies Judge Flournoy found the motions had merit, but let the case go to the jury anyway. Judge Flournoy actually said Mrs. Titelman made a good case, "but reasonable doubt is for the jury." [Vol. 2-Doc. 47-Ex. 3- pg 13]

were procured by fraud or corruption. *Akins v. Warren*, 258 Ga. 853, 375 S.E.2d 605 (1989) (where a plaintiff cannot provide evidence, such as perjured testimony or other conduct amounting to intentional corruption of the criminal court, a denial of a motion for directed verdict conclusively shows that probable cause existed). Attorney Ducote has never attempted to discharge that obligation.

Rather, Attorney Ducote argues the criminal trial judge simply has too much discretion to foreclose a subsequent malicious prosecution action. These contentions were raised and decided in *Wingster v. Huntley's Jiffy Stores, Inc.*, 200 Ga. App. 252, 407 S.E.2d 481 (1991) and *Davis v. Trusthouse Forte Hotels Worldwide, Inc.*, 195 Ga. App. 768, 395 S.E.2d 235 (1991). These cases follow *Monroe v. Sigler* in holding denials of directed verdict motions in underlying criminal trials, in the absence of fraud or corruption, conclusively demonstrate probable cause. *See also Wolf Camera, Inc. v. Royter*, 253 Ga. App. 254, 558 S.E.2d 797 (2002); *Kelly v. Serna*, 87 F.3d 1235, 1241 (11th Cir. 2002).

Attorney Ducote cites the dissent in *Griffin v. Georgia Power Co.*, 186 Ga. App. 565, 567-568, 367 S.E.2d 565 (1988) for support. Judge Banke was concerned with what he considered to be the majority's extension of *Monroe v. Sigler*, so as to create

> an absolute bar to an action for malicious prosecution not merely in those cases where the criminal trial judge allowed the case to go to the jury over a motion for directed verdict, but also in those cases where, after initially refusing to direct a verdict of acquittal, the judge ultimately granted the motion.

Id. In the present case, Judge Flournoy refused to grant a directed verdict twice. Ducote's reach for support in the *Griffin* dissent fails.

Attorney Ducote points to the dissent in *Atlantic Zayre, Inc. v. Meeks*, 194 Ga. App. 267, 268, 390 S.E.2d 398 (1990). He fails to note *Monroe v. Sigler* was not controlling there "because the juvenile proceeding is totally other than and distinct from a criminal proceeding . . ." and there is "a crucial distinction between the posture of the accused juvenile . . ." in a juvenile proceeding, and the posture of a criminally accused adult at trial. *Id.* Again, Attorney Ducote's reach for support in a dissent fails.

Next, Ducote cites *Haile v. Pittman*, 194 Ga. App. 105, 108, 389 S.E.2d 564 (1989), and the dissent of Judges Benham and Beasley. Again, Ducote fails to note the reason for the dissent's minor departure from *Monroe v. Sigler.* Specifically, the dissent felt *Monroe v. Sigler* was inapplicable where at the underlying trial, "there was no proper motion for directed verdict, as the law does not provide for such in a bench trial . . ." *Id.* No motion for directed verdict was made in the underlying criminal trial in *Haile*, and thus *Monroe v. Sigler*, in the dissent's view, was inapplicable. In the present case, Plaintiff was not only given the opportunity to make motions for directed verdict, but did so twice.

Finally, Attorney Ducote relies on *Wolf Camera, Inc. v. Royter*, 253 Ga. App. 254, 558 S.E.2d 797 (2002). The plaintiff in *Royter* came forward with specific allegations of theft, showing the store manager failed to provide police with a "paid out" slip. This showed the plaintiff used the money that same day to purchase supplies from the store, conclusively demonstrating his innocence.

In the present case, despite the District Court's specific instruction to Ducote, he alleged no facts in the Amended Complaint to show Judge Flournoy's denials of Mrs. Titelman's motions for directed verdict were the product of fraud or corruption. Far from supporting any argument for the modification of malicious prosecution law in Georgia, *Royter* underlines Attorney Ductote's failure to come forward with any evidence Judge Flournoy's decisions were procured through fraud or corruption.

RULE 11 SANCTIONS WERE CORRECTLY IMPOSED FOR ATTORNEY DUCOTE'S FAILURE TO SET FORTH ANY EVIDENTIARY SUPPORT

Finally, Rule 11 sanctions are appropriate where, as here, the factual contentions are completely devoid of evidentiary support. Attorney Ducote has never cited one factual allegation of wrongdoing of Respondents, and does not address this ground for sanctions in his Petition.

Attorney Ducote fails to allege (for he cannot truthfully do so) Respondents played any role in the procurement of the warrants leading to Mrs. Titelman's arrest. He alleges no facts showing Mayoue or Gray instigated or caused the alleged malicious prosecution of Mrs. Titelman. The decision to prosecute her was for others to make. Attorney Ducote cites to no evidence (not even conclusory allegations or unwarranted deductions of fact) to show Respondents gave false or misleading information in connection with Mrs. Titelman's arrest. [Vol. 2-Doc. 39] He does not allege facts showing Mayoue and Gray unduly influenced the authorities in Mrs. Titelman's prosecution.[2] He makes no

[2] Attorney Ducote conducted the depositions of Cobb County District Attorney Patrick H. Head, Prosecuting Attorney Francie (Cont'd)

allegations Mayoue and Gray presented testimony at the Grand Jury hearing which led to Mrs. Titelman's indictment. He makes no allegations Mayoue and Gray testified at the trial of her criminal case. In fact, the Amended Complaint states no allegations Mayoue and Gray participated in *any* manner in the underlying criminal trial. Neither Respondent instigated the procurement of the warrants leading to Mrs. Titelman's arrest. [Vol. 2-Doc. 33]

Such facts as outlined above were essential to prove Respondents "instigated" the prosecution. *See Melton v. La Calamito*, 158 Ga. App. 820, 282 S.E.2d 393 (1981) (where a defendant provides no false information but merely states what he believes, leaving the decision to prosecute to the discretion of the officer, or the plaintiff is prosecuted for an offense other than the one charged by the defendant, the defendant is not regarded as having instigated the proceedings).[3] *Moses v. Revco Discount Drug Centers of Georgia, Inc.*, 164 Ga. App. 73, 74, 296 S.E.2d 384 (1982) ("statements made in good faith to police offices or others

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(Cont'd)
Hakes and Rose Wing of the District Attorney's office. Had there been any facts raised in those depositions implicating Mayoue and Gray in the instigation of the prosecution, those facts should have been alleged in the Amended Complaint.[Vol. 3-Doc. 79-pg 8]

[3] In the Amended Complaint, Attorney Ducote argues the District Attorney may have prosecuted Mrs. Titelman under the wrong code section. [Vol. 2-Doc. 39] Undisputedly, Mayoue and Gray cannot be held legally responsible for the District Attorney's decision as to the particular code section under which a charge against Mrs. Titelman was brought. *See Melton, supra.*

investigating criminal activity cannot be the basis for a tort action"). Moreover,

> [t]he law draws a fine line of demarcation between cases where a party directly or indirectly urges a law enforcement official to begin criminal proceedings and cases where a party merely provides facts to an official who then makes an independent decision to arrest or prosecute. In the former case, there is potential liability for false imprisonment or malicious prosecution; in the latter case, there is not.

Martin v. Reitz, 152 Ga. App. 854, 855-856, 264 S.E.2d 305 (1980).

Attorney Ducote failed to allege facts sufficient to establish that Respondents "instigated" Mrs. Titelman's prosecution. The action for malicious prosecution filed against them was devoid of factual merit. The District Court found that "[d]espite the Court's specific instructions to Plaintiff that she needed to plead with particularity why each Defendant was appropriately in the case, Attorney Ducote resorted to shotgun pleading in her Amended Complaint." [Vol. 3-Doc. 76-pg 4] This Court recognizes that term, *citing Anderson v. Dist. Bd. of Trustees of Cent. Fl. Comm. Coll.*, 77 F.3d 364, 366 (11th Cir. 1996) (citation and punctuation omitted) and *Strategic Income Fund, LLC v. Spear, Leeds & Kellogg Corp.*, 305 F.3d 1293, 1296 (11th Cir. 2002) Instead of setting forth factual allegations supportive of the malicious prosecution elements, Ducote merely alleged "all Defendants directly and jointly aided, counseled, and abetted the malicious prosecution." [Vol. 3-Doc. 76-pg 4] There is no explanation for how Respondents supposedly "directly and

jointly aided, counseled and abetted the malicious prosecution." [Vol. 2-Doc. 39] Indeed, as the District Court found, "Plaintiff was unable to associate a Defendant to any particular facts in her Amended Complaint despite the fact that the Court allowed her to engage in discovery with respect to the District Attorney's Office." [Vol. 3-Doc. 76-pg 5] Almost four (4) years later, Attorney Ducote still makes no such association.

CONCLUSION

Attorney Ducote's claims were presented for improper purposes, including to harass and to cause unnecessary trouble and expense for Respondents. He attempted to re-litigate his client's divorce and child custody proceedings under the guise of a malicious prosecution case. He resorted to a "sue 'em all'" strategy first. Second, when given an opportunity by the Court and its specific direction, he failed to state a case against Respondents. The District Court refused to let Attorney Ducote harass Respondents absent paying the price.

Attorney Ducote's claims and legal contentions were not warranted by existing law, are directly contrary to clear and well established law, and were not supported by any good-faith argument for the modification of the law. His contentions concerning his proposed modification of existing law are not supported by good faith arguments. He must now pay the price Rule 11 envisions and in fact requires. These Respondents request his Petition be denied.

Respectfully submitted,

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No. 05-99

Supreme Court, U.S.
FILED
AUG 17 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

RICHARD DUCOTE,

Petitioner,

vs.

ANDREW TITELMAN, CRAIG CHANDLER, JOHN MAYOUE, PAMELA GRAY, AND DIANE WOODS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT ANDREW CHARLES TITELMAN'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did either the U.S. District Court for the Northern District of Georgia or the U.S. Court of Appeals for the Eleventh Circuit abuse its discretion in awarding or otherwise approving the imposition of sanctions against Petitioner Richard Ducote pursuant to Rule 11 of the *Federal Rules of Civil Procedure* pursuant to the circumstances of the underlying case?

INTERESTED PARTIES

Brinson, Askew, Berry, Siegler, Richardson & Davis
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Cauthorn & Associates
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Cordle, Kristi
Davis, J. Anderson
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Hall Booth, Smith & Slover, P.C.
Heustis, Robert
Hirsh, Michael
Kanik, Beth W.
Mayoue, John
McDonald, James T.
Richard Ducote & Associates, P.L.C.
Sapp, Christopher
Swift, Currie, McGhee & Hiers
Titelman, Andrew Charles
Titelman, Wendy Jane
Woods, Diane
Warner, Mayoue & Bates, P.C.
Woods & Hamby

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CITATIONS TO OPINIONS AND ORDERS BELOW

Michael Hirsh and Richard Ducote v. Andrew Charles Titelman, et al., No. 03-14429, U.S. Court of Appeals for the Eleventh Circuit, February 8, 2005. Unreported. Rehearing denied, April 15, 2005.

Wendy Jane Titelman v. Andrew Charles Titelman, et al., Civil Action No. 1:01-CV-1845-JOF. September 17, 2001; July 29, 2003; July 30, 2005. Unreported.

JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of Georgia exercised jurisdiction over the underlying complaint for malicious prosecution and punitive damages pursuant to 28 U.S.C. § 1332. The District Court awarded sanctions to all Respondents pursuant to Rule 11 on July 29, 2003. The U.S. Court of Appeals for the Eleventh Circuit affirmed the District Court's Order on February 8, 2005. Petitioner subsequently sought a rehearing and rehearing *en banc*. These requests were denied on April 15, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to grant a writ of certiorari to review the decision rendered by the U.S. Court of Appeals for the Eleventh Circuit.

RELEVANT STATUTES

Rule 11, *Federal Rules of Civil Procedure*

O.C.G.A. § 51-7-40. A criminal prosecution which is carried on maliciously and without any probable cause and which

causes damage to the person prosecuted shall give him a cause of action.

STATEMENT OF THE CASE

This present action arises out of the criminal prosecution of Wendy Jane Titelman ("Ms. Titelman"), Petitioner's client, for Intentional Interference with Interstate Custody, *State of Georgia v. Wendy Jane Titelman*, Case Number 00-9-4681-40 (hereinafter, the "criminal case"). Respondent Andrew Titelman, her former husband, swore the initial misdemeanor arrest warrant as Ms. Titelman retained possession of their two minor children beyond the agreed upon visitation period, contrary to O.C.G.A. § 16-5-45(b)(1)(c). (R2-43-Ex. A) Thereafter, a felony arrest warrant for Interstate Interference with Custody was issued and a General Bill of Indictment handed down pursuant to the felony arrest warrant. (R2-43-Ex. B, C) A trial ensued before Judge Robert Flournoy, III, in State Court, Cobb County, Georgia. (R20-43-Ex. B, C)

At the conclusion of the State's evidence and again at the close of all evidence in the April 2001 trial, Ms. Titelman unsuccessfully moved for a directed verdict. (R2-47-Ex. 3-pg 1-12) These two motions for directed verdicts were denied by the Honorable Robert E. Flournoy, III. (R2-47-Ex. 3-pg 6, 10)

On July 13, 2001, Ms. Titelman filed a Complaint for Compensatory and Punitive Damages for Malicious Prosecution, naming Respondent Andrew Charles Titelman as a defendant. (R1-1) Ms. Titelman also named Mr. Titleman's attorneys, Mayoue and Gray, as defendants. (R1-1) Finally, Ms. Titelman named the Detective who

arrested her as a defendant. (R1-1) These Defendants jointly moved before Judge Owen Forrester for a discovery conference to address discovery problems and to advise the Court of their intent to move for dismissal. (R1-30) The Court granted Defendants' Motions. (R2-36)

At this discovery conference, the Court directed Petitioner and local counsel, Michael Hirsh, to file an Amended Complaint so as to allege facts that establish the prosecution was carried on maliciously and without probable cause. (R3-76) Petitioner was to allege facts to establish that Judge Flournoy's Orders denying Ms. Titelman's motions for directed verdicts were procured by fraud or corruption. (R3-76-13) Judge Forrester advised Petitioner that if he did not allege facts so as to establish that Judge Flournoy's Orders were procured by fraud or corruption, the Complaint would be subject to dismissal. (R3-76-13) However, the Amended Complaint drafted and filed by Petitioner nevertheless failed to allege facts that established how Judge Flournoy's denial of each motion for directed verdict were achieved through fraud or corruption. (R3-76-9) Each of the named Defendants subsequently moved to dismiss for failure to state a claim since Petitioner failed to show probable cause as he did not allege facts so as to establish that Judge Flournoy's denial of each motion for directed verdict was procured by fraud or corruption. (R3-76-13)

On August 8, 2002, the District Court granted all Respondents' motions to dismiss for failure to state a claim upon which relief can be granted, pursuant to *Federal Rule of Civil Procedure* 12(b)(6). (R3-76-13) On January 23, 2002, Respondents Mayoue and Gray filed Motions with the District Court for sanctions under Rule 11 of the *Federal Rules of Civil Procedure*. (R3-58) Respondent

Chandler's Motion for sanctions followed and was filed on January 25, 2002. (R3-59) Respondent Titelman's (R3-62), and Woods' (R3-71, 73) Motions for Sanctions followed shortly thereafter.

On September 17, 2002, Judge Forrester issued an Order granting Respondents' Motions for Sanctions, and awarded a total of $84,905.55. (1-A, Petitioner's Appendix) On July 29, 2003, Judge Forrester entered Judgment against Petitioner and Hirsh in the amount indicated above as sanctions under Rule 11 for pursuing a baseless claim. (31-A, Petitioner's Appendix)

This Order was subsequently upheld by the U.S. Court of Appeals for the Eleventh Circuit, in an Opinion dated February 8, 2005. (51-A, Petitioner's Appendix) The Eleventh Circuit also denied a later request for rehearing on April 15, 2005. (63-A, Petitioner's Appendix)

ARGUMENT

I. MALICIOUS PROSECUTION IN GEORGIA

Under Georgia law, "[a] criminal prosecution which is carried on maliciously and without any probable cause and which causes damage to the person prosecuted shall give him a cause of action." O.C.G.A. § 51-7-40. In order to prevail on a malicious prosecution claim, a plaintiff must show: "(1) prosecution for a criminal offense; (2) instigated without probable cause; (3) with malice; (4) under a valid warrant, accusation or summons; (5) which is terminated favorably to the plaintiff; and which (6) has caused damage to the plaintiff." *Kelly v. Serna*, 87 F.3d 1235, 1240-41

(11th Cir. 1996); *see also*, *Wal-Mart Stores, Inc. v. Blackford*, 264 Ga. 612, 449 S.E.2d 293 (1994).

The Supreme Court of Georgia has stated with particularity under what set of circumstances probable cause is established as a matter of law. *See*, *Monroe v. Sigler*, 256 Ga. 759, 353 S.E.2d 23 (1987). In *Monroe*, the Supreme Court of Georgia stated

> [w]hen the trial judge, having heard all of the state's evidence, considers a motion on behalf of the accused (the accused being present and given an opportunity to be heard in support of the motion); and when the judge rules that the evidence is sufficient *as a matter of law* to support a conviction (that is, sufficient to enable a rational trier of fact to find each and every element of the guilt of the accused beyond a reasonable doubt), we can see no reason why such a holding – unreversed and in the absence of fraud or corruption – should not suffice as to the existence of probable cause.

Monroe, 256 Ga. at 761, 353 S.E.2d at 25 (emphasis in original).

Petitioner has admitted that Ms. Titelman's two motions for directed verdict at her criminal trial were denied. (Brief for Petitioner, pps. 5-6) Georgia law in general, and *Monroe* specifically, clearly and uncontrovertedly hold that probable cause has been established as a matter of law. However, to avoid the application of *Monroe*, and a finding of probable cause as a matter of law, Petitioner was required to plead fraud or corruption in procurement of Judge Flournoy's Orders. Petitioner does not deny that he failed to plead fraud or corruption in the Amended Complaint. Petitioner does not contend that the

Court's dismissal of the Amended Complaint constituted error. Rather, he pleads that *Monroe* was inapplicable to this case and therefore, such allegations did not need to be plead. Further, he argues that his interpretation of *Monroe* was reasonable, such that it did not mandate the award of Rule 11 sanctions.

For reasons discussed *infra*, none of Petitioner's arguments withstand scrutiny. Petitioner was required to plead fraud or corruption in the procurement of Judge Flournoy's Orders to avoid a finding of probable cause as a matter of law. Petitioner has not shown that he could have reasonably and objectively interpreted *Monroe* as inapplicable. Petitioner's efforts herein constitute no more than an effort to provide Ms. Titelman with another forum, a higher and more public form, to dispute the custodial rights awarded to Respondent over their two children. Petitioner's efforts herein constitute no more than an effort to provide Ms. Titelman with another forum to dispute the custodial rights awarded to Respondent over their two children.

A. Judge Flournoy's Orders Denying Directed Verdict Imply that Evidence Was Sufficient as a Matter of Law to Support a Conviction

Petitioner first argues that the trial judge never specifically found that the evidence was sufficient as a matter of law to support a conviction when he denied Ms. Titelman's two motions for directed verdict. (Brief for Petitioner, pps. 6-7) In other words, he argues that Judge Flournoy did not really deny the motions for directed verdict. This argument is contrary to Georgia law and logic since its application would imply that any time a trial court denies a motion for directed verdict but fails to mechanically recite the standard of proof required to grant